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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VANESSA SIMMONDS,

Plaintiff,

v₁

BANK OF AMERICA CORPORATION, a
Delaware corporation, successor in interest
to FLEETBOSTONROBERTSON
STEPHENS, INC.

Defendant

and

OMNIVISION TECHNOLOGIES, INC., a
Delaware corporation.

Nominal Defendant.

NO. C07-1668

COMPLAINT FOR RECOVERY OF
SHORT-SWING PROFITS UNDER
SECTION 16(b) OF THE SECURITIES
EXCHANGE ACT OF 1934

JURY DEMAND



07-CV-01668-CMP

I. IDENTIFICATION OF PARTIES

1. ***Plaintiff Simmonds.*** Plaintiff Vanessa Simmonds is a resident of the state of Washington. She is a shareholder of Omnisvision Technologies, Inc.

43 2. ***Defendant Bank of America Corporation.*** Bank of America Corporation ("Bank
44
45 of America") is a Delaware corporation headquartered in Charlotte, North Carolina. Bank of

**COMPLAINT FOR RECOVERY OF
SHORT-SWING PROFITS UNDER § 16(b) – 1**

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1 America is successor in interest to FleetBoston Robertson Stephens, Inc. ("FBRs"), and transacts
 2 business in the Western District of Washington.
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5 3. ***Nominal Defendant.*** Nominal defendant Omnivision Technologies, Inc.
 6 ("Omnivision") is a Delaware corporation headquartered in Sunnyvale, California, and is the
 7 issuer in this action brought under Section 16(b) of the Securities Exchange Act of 1934, 15
 8 U.S.C. § 78p(b) ("Section 16(b)").
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11 **II. JURISDICTION AND VENUE**

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 13 4. ***Jurisdiction.*** Jurisdiction in this Court arises under Section 27 of the Securities
 14 Exchange Act of 1934, 15 U.S.C. § 78aa.
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17 5. ***Venue.*** Venue is proper in this Court under Section 27 of the Securities
 18 Exchange Act of 1934, 15 U.S.C. § 78aa, because, *inter alia*, Bank of America transacts business
 19 in this district.
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22 **III. STATUTORY DEMAND AND VESTING OF SECTION 16(b) CLAIMS**

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 24 6. ***Statutory Demand.*** By letter dated July 23, 2007, which was faxed and mailed to
 25 the Omnivision board of directors on that date, Ms. Simmonds made a 60-day demand on
 26 Omnivision pursuant to Section 16(b).
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29 7. ***Failure to Comply with Demand.*** More than 60 days have elapsed, and
 30 Omnivision has failed to comply with Ms. Simmonds' Section 16(b) demand.
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33 8. ***Vesting of Claims in Plaintiff.*** As a result of Omnivision's failure to comply
 34 with Ms. Simmonds' demand, all rights to maintain this action have vested fully in Ms.
 35 Simmonds pursuant to Section 16(b). Omnivision is named herein only as a nominal party.
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IV. FACTUAL ALLEGATIONS

9. ***Lead Underwriters on Omnivision IPO.*** Prior to March 8, 2000, the date on which Omnivision filed its initial preliminary prospectus with the Securities and Exchange Commission ("SEC"), Omnivision retained RS to serve as lead underwriter on the Initial Public Offering ("IPO") of Omnivision common stock. Omnivision filed its final prospectus with the SEC on July 14, 2000, and identified FBRS as lead underwriter on its IPO.

10. ***Lock-Up Agreements.*** As a condition of the underwriting, Omnivision's directors and officers, as well as other stock and option holders, as identified in the IPO prospectus, entered into "lock-up agreements" with FBRS and the other IPO underwriters. The lock-up agreements were for the specific purpose of collectively holding - and refraining from selling - shares of Omnivision stock, and furthered the overall common objective described below. These lock-up agreements provided that, subject to limited exceptions, the stockholder could not offer, sell, contract to sell, pledge or otherwise dispose of any Omnivision common stock or securities for a period of 180 days after the effective date of the IPO. FBRS, however, had the right, in its sole discretion, at any time without notice, to release all or any portion of the shares subject to lock-up agreements. As a result, FBRS, for itself and as representative of the other IPO underwriters, directly or indirectly shared control over the disposition of approximately 16 million shares of Omnivision common stock at the time of the Omnivision IPO.

11. *Creating Opportunity to Profit from "Hot" Omnitvision IPO.* Based on its assessment of Omnitvision as a potentially "hot" IPO – *i.e.*, one in which there likely would be substantial investor demand for shares of Omnitvision stock in both the IPO allocation and

1 aftermarket – FBRS created the opportunity for itself, directly and indirectly, to profit or share in
 2 any profits derived from transactions in Omnivision stock.
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5 12. *Lack of Good Faith in IPO Underwriting Activities.*

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 7 (a) *Scheme to Share in Customer Profits.* FBRS, directly and indirectly,
 8 through contracts, arrangements, understandings, relationships or otherwise, created the
 9 opportunity for itself, directly and indirectly, to profit or share in any profits derived from the
 10 transactions of its customers in Omnivision stock. This conduct violated NASD Conduct Rule
 11 2330(f), which prohibited FBRS from sharing, directly or indirectly, in the profits or losses of its
 12 customers. Based on this violation, FBRS lacked good faith in connection with its IPO
 13 underwriting and distribution activities involving Omnivision stock.
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16 (b) *Laddering Activities.* FBRS, in conjunction with the other IPO underwriters
 17 and with the objective of inflating the aftermarket price of Omnivision stock, secretly required
 18 customers, in return for allocations of Omnivision IPO shares, to purchase additional shares of
 19 Omnivision stock in the aftermarket at progressively higher prices. This practice is referred to as
 20 “laddering,” and violates Rule 101 of Regulation M under the Securities Exchange Act of 1934.
 21 Based on this violation, FBRS and the other IPO underwriters lacked good faith in connection
 22 with their IPO underwriting and distribution activities involving Omnivision stock.
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25 13. *Common Objective to Inflate Aftermarket Price of Omnivision Stock.* FBRS
 26 and Omnivision officers, directors and principal shareholders coordinated their efforts towards
 27 inflating the aftermarket price of Omnivision stock to a level sufficiently above the IPO price to
 28 enable them to reap substantial profits from the sale of Omnivision stock.
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1 14. ***Furtherance of Common Objective.*** In furtherance of this common objective,
 2 Omnivision officers, directors and principal shareholders agreed to, or acquiesced in, the pricing
 3 of Omnivision's IPO shares at a small fraction of what they knew to be the likely aftermarket
 4 price range of Omnivision stock based on clear indications of IPO and aftermarket demand. They
 5 did so with the expectation of deriving personal financial benefits, after the expiration of the
 6 lock-up agreements, from the sale of their Omnivision stock into a market inflated through the
 7 activities of RS and other IPO underwriters. For its part, FBRS engaged in laddering and
 8 improper research-related activities that were designed to inflate the market price of Omnivision
 9 stock. FBRS did so with the expectation of creating the opportunity to profit or share in any
 10 profits derived from transactions in Omnivision stock.
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12 15. ***IPO Shares Priced at \$13, Trade in Aftermarket at \$37.*** The 5.75 million shares
 13 of Omnivision stock sold in connection with its IPO raised \$69.5 million for Omnivision –
 14 slightly more than just one-third of what buyers paid for Omnivision shares in the immediate
 15 aftermarket.
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17 16. ***10% Group Status.*** FBRS, the other IPO underwriters and Omnivision officers,
 18 directors and principal shareholders beneficially owned Omnivision stock while they pursued a
 19 common objective that involved acquiring, holding or disposing of Omnivision stock, and
 20 thereby constituted a group (the "Group") pursuant to Section 13(d) of the Exchange Act of 1934
 21 and Rule 13d-5 promulgated thereunder. Collectively, the Group beneficially owned in excess
 22 of 10 percent of Omnivision's outstanding common stock from the Group's inception prior to
 23 July 14, 2000, through at least July 13, 2001 (the "Relevant Period"). As a result, FBRS and the
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1 other members of the Group were subject to the reporting requirements of Section 16(a) and the
 2 short-swing trading prohibition of Section 16(b) throughout the Relevant Period.
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5 17. *Transactions in Omnivision Stock.* Throughout the Relevant Period and within
 6 periods of less than six months, FBRS profited from purchases and sales, or sales and purchases,
 7 of Omnivision stock of which FBRS was beneficial owner for purposes of Section 16(b) (the
 8 “Transactions”). FBRS directly or indirectly had or shared a direct or indirect pecuniary interest
 9 in Omnivision stock in various ways, including, but not limited to, the following: (i) by sharing
 10 in the profits of customers to whom FBRS made IPO allocations of Omnivision stock; (ii) by
 11 allocating shares of Omnivision stock to executives and other high-level insiders of other
 12 companies, both private and public, from which FBRS expected to receive new or additional
 13 investment banking business in return (a practice referred to as “spinning”); and (iii) by creating
 14 the opportunity for other members of the Group to derive personal financial benefits from the
 15 sale of Omnivision stock into an inflated market, in an effort by FBRS to obtain future
 16 investment banking business from Omnivision.
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19 18. *Failure to Comply with Section 16(a) Reporting Requirements.* FBRS failed to
 20 report the Transactions as required under Section 16(a) of the Securities Exchange Act of 1934,
 21 15 U.S.C. Section 78p(a), thereby tolling the two-year statute of limitations set forth in
 22 Section 16(b). Because FBRS failed to report these Transactions as required by Section 16(a),
 23 the precise dates of prohibited Transactions by FBRS, any member of the Group, or others, in
 24 Omnivision stock beneficially owned by FBRS, are unknown to Ms. Simmonds at this time.
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V. CAUSE OF ACTION

**Short-Swing Profits Generated In Violation of Section 16(b) of the
Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).**

19. *Incorporation.* The allegations in the preceding paragraphs are incorporated as if fully set forth herein.

20. *Short-Swing Trades.* FBRS profited from the Transactions in Omnicision stock by engaging in such Transactions within periods of less than six months during the Relevant Period. FBRS thereby violated Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

21. *Remedy.* Bank of America, as successor in interest to FBRS, must disgorge all profits, with interest, from its short-swing Transactions in Omnivision stock, in amounts to be proven at trial.

VI. REQUESTED RELIEF

Plaintiff respectfully requests the following relief:

(a) Judgment against Bank of America for all profits from the Transactions prohibited by Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(b), in amounts to be proven at trial;

(b) An award of pre-judgment and post-judgment interest on all amounts awarded or restitution or disgorgement ordered;

(c) An award of costs and attorneys' fees against Bank of America; and

(d) Such other and further relief that this Court deems just and equitable.

1 DATED this 12th day of October, 2007.
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4 **GORDON TILDEN THOMAS & CORDELL LLP**
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7 By 
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